

## This Week's Feature

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### How to Develop an Effective Working Relationship with In-House Counsel

by Isabel Diaz Barroso

The most successful attorney–client relationships are those in which both the attorney and the client closely collaborate and communicate consistently, and often, in which expectations are clearly defined, and in which trust is nurtured and preserved. There is no dispute that building trust takes time and effort and begins with demonstrating and maintaining fair and equal treatment between corporate counsel and outside counsel. Kristin Casler, *Does Your In-House/Outside Counsel Relationship Need Counseling?*, Corporate Counsel Newsletter (2016).

Building a good working relationship with outside counsel is crucial to streamlining the litigation process and effectively managing the representation. Both in-house and outside counsel should be clear about the anticipated legal expenses; budgets should be set and negotiated as the litigation develops. Counsel should discuss strategy and tactics and work toward establishing trust early, which will foster a more productive and durable relationship. Cynthia Hsu, [Top 5 Tips to Improve Outside Counsel Relationships](#), In-House: The Findlaw Corporate Counsel Blog (Aug. 9, 2011).

As with any relationship, choosing the right partner is very important. Unlike the average individual, corporate counsel are fairly sophisticated consumers of legal services. Selecting the right attorney or law firm to handle a particular matter involves considering several factors: reputation; expertise in the particular area of law; track record with similar matters, in terms of scope and issues; location and whether local offices can immediately handle the particular matter; knowledge regarding a particular forum, e.g., judges, potential jury pool, adverse parties, potential conflicts; and billing rates (particularly for small or medium-sized companies). *Working Effectively With Outside Counsel Checklist*, Practical Law (Thomson Reuters, 2016). Another key consideration may be whether the outside counsel has knowledge of the client or the client's industry since a law firm with experience handling particular matters or other clients in that industry may have a better understanding of the organization's risk tolerance and business objectives.

Diversity may be another factor. Many large multi-national corporations may insist that their outside counsel have a diverse group of minority and women attorneys handle a particular matter. Certainly having teams comprised of people from different backgrounds will add to the diversity of ideas and perspectives offered, and this may lead to potentially creative solutions to resolve legal disputes. Of course, diversity as a core objective depends on the industry and a company's overall culture. And the lack of diversity in a particular industry, such as the financial services sector or technology, may provide an opportunity for less-represented attorneys to showcase their knowledge skills and talent in the handling of a particular matter.

Another important consideration when hiring outside counsel is location and familiarity with a particular venue. In specialized industries, such as the financial services sector, where various affiliates and subsidiaries may be situated around the United States and internationally, corporate counsel may specifically look for outside counsel located in areas where potential claims or lawsuits may be filed. Of course, there are certain practice areas, notwithstanding their national breadth and scope, which may still require the involvement of local counsel. For example, real estate, land use, and health care, to name a few, are largely represented by outside counsel, in large part due to the "local flavor" of the particular matters involved.

Corporate legal departments may use a competitive bidding process and invite several law firms to participate in a "contest," during which the "contestants" present their capabilities to a company; introduce the proposed team, including all partners and associates who may work on the representation; submit a bid that includes a detailed estimate of all fees and costs for the representation; and provide a list of previous engagements for similar matters with client references. *Id.*

In specific practices areas, such as securities litigation, for instance, there are a select number of law firms and attorneys with the expertise, proficiency, and knowledge to handle particular matters. In these fairly tight-knit

communities of lawyers with specialized expertise, it is fairly easy for corporate legal departments to know who to call. In fact, similar institutions within a particular industry may hire the same law firms or attorneys.

The fee arrangement is another important consideration, and law firms that offer alternative fee arrangements, as opposed to strict hourly billing, may be more inviting. Some examples of alternative fee arrangements include a fixed (flat) fee, which offers predictable pricing for routine legal matters and is common in the insurance industry; blended or hybrid rates, in which a law firm may charge an agreed rate for all attorneys staffing a legal matter; capped fees, in which each attorney may bill the attorney's usual billing rate but the total bill cannot exceed a capped amount; or collared fees, in which a client pays a law firm hourly fees subject to a case budget and a "collar" (a range above and below the budget, typically 10 percent). With collared fees, if the total fees are less than the lower collar amount, outside counsel receives a bonus. If the total fees are higher than the upper collar amount, the client receives a discount, an offset against the law firm's hourly rate. Other fee arrangements include "hold-backs," in which the client withholds an agreed fee amount until a certain result is achieved, or until the end of the engagement; "success fees," which pay the law firm a bonus for achieving a certain result; and contingent-fee arrangements, in which the client pays the law firm a percentage of the total financial recovery obtained in a matter. *Id.*

Corporations are not monolithic or static, and they are constantly evolving, so it may be unrealistic for outside counsel to "understand" an organization's business objectives completely. That being said, outside counsel should have a general understanding regarding the products or services offered by a company, and how those may influence the company's strategies and goals in litigating or defending a particular matter.

While in-house counsel can expect their hired attorneys to have the expertise and legal acumen to handle particular matters, there is a greater appreciation for those outside attorneys who understand what is expected of corporate counsel and tailor their requests for information or documents during the course of litigation accordingly. For example, in a multi-national securities firm, it would be a significant challenge for an in-house lawyer to accommodate discovery requests seeking electronic communications, and the in-house lawyer would anticipate that outside counsel would know how to jump through the multiple "hoops" to satisfy such a request. In a case involving representing a securities firm, outside counsel should have anticipated those challenges and made arguments to opposing counsel or the court to demonstrate why a particular discovery request should be narrowly tailored to the particular issues in a case. Outside counsel should have some understanding of how the business works and know the relevant departments, decision makers, and corporate history. Not only may it prove beneficial to streamline the discovery process, it also demonstrates a keen interest in a corporate client's identity and brand.

In-house counsel also may appreciate it when an outside attorney recognizes that the in-house counsel's position within the organization involves limitations or constraints that may influence his or her decision making or authority. Understanding that corporate counsel may need to obtain approval from multiple individuals in the department hierarchy, or will need to have sufficient time to request a settlement check, and conveying that understanding by handling a particular matter so that it makes "less work" for in-house counsel, is another way that outside attorneys can "add value" and prove themselves to be indispensable to their clients. In this way, outside counsel are generating goodwill with their in-house counsel counterparts.

In-house counsel may look to outside attorneys to "think outside the box" and offer creative solutions to resolve litigation and achieve a company's stated business goals. The main objective is to resolve a case in the most cost-effective manner. At the outset, it is critical to discuss strategies to achieve a quick resolution. Is a motion to dismiss viable? Is the complaint patently wrong and does it make sense to ask opposing counsel to consider a dismissal? Is there specific discovery to propound or respond to which may set up a dispositive motion at a future juncture, or does something specific offer leverage for an early mediation or settlement without extensive discovery? There may be instances in which taking an aggressive posture is necessary to defend a corporation, and in-house counsel may want to move forward with counter-claims and Rule 11 sanctions.

Outside counsel should have a clear understanding of a company's objectives and long-term strategy, whether it is keeping costs low, minimizing business disruption, the possibility of additional lawsuits, statute of limitations issues, or forum-shopping, among others. Some in-house counsel may want to be consulted throughout the litigation, on everything from deciding to pursue motion practice or extensive discovery, to identifying key corporate representatives for depositions.

How else can outside counsel add value? Offer pragmatic advice and look for creative solutions to litigate from a position of strength, instead of taking a predictable and conservative stance. Certainly, outside counsel must produce high-quality work product on time, every time. If there are billing guidelines, outside counsel is responsible for making sure that all members of the legal team follow them and provide appropriate and timely updates to the client. Requesting authority for taking certain actions on a particular file is very important, particularly when it comes to hiring experts, filing dispositive motions, working toward settlement, or preparing for a trial. Failing to do so may deal a fatal blow and destroy any potential goodwill or trust that has been earned over the course of the relationship.

Litigation strategy may also involve discussing outcomes and whether there is a cost-effective means to achieve a “good result.” How does the in-house counsel define a “good result”? It may be largely case specific, but having candid discussions with in-house counsel regarding their expectations and stated objectives will give outside counsel better understanding regarding how an “outcome” may fit into a corporation’s overall, long-term strategy. A good result may be getting a matter dismissed early with minimal expense, or pushing a litigation strategy that leads to a favorable settlement. While in some industries it may be rare to take a case to a trial, certainly winning a trial or reaching a verdict that is favorable for the client can be seen as a “good result.” A good result can also be paying less on a case than what it may be worth, while a “bad result” may be the exact opposite.

From the perspective of outside counsel, it is important that corporate counsel provide clear direction, particularly since the respective objectives for the organization and the outside attorney or firm may be fundamentally different. Constant and effective communication is critical. In-house counsel must explain how strategically important a particular case might be and then succinctly define what it is that a company requires outside counsel to do. It may be necessary to balance the potentially divergent objectives between the organization and the attorney or law firm hired to represent it.

In-house counsel must ensure that billing guidelines are followed and budget requirements are met. Periodic and regular updates regarding the status of the litigation are also important and should be provided timely. Byron P. Hansbro & Michael Van Riper, *Managing Relationships with Outside Counsel*, DRI—Insurance Coverage and Claims (Apr. 2016). Outside counsel should be cognizant of the potential for adverse rulings, unexpected increases in litigation expenses that may affect the overall reserves, and any potential negative press or media attention. Outside counsel should continually address these with in-house counsel as litigation moves forward. This way, outside counsel can work in tandem with corporate counsel to address problems as they arise.

Essentially, the hiring organization likely wants to pay as little as possible, while the hired attorney or law firm may want to earn as much as possible, and perhaps, ensure against an unfavorable result by paying a settlement that the organization may perceive is unreasonable. In that case, the in-house counsel may look to the outside attorney for guidance and assistance to move forward with a strategy or result that may be in the corporation’s best interests, even if it means that the fallout from a less than favorable result is shared by all, e.g., attorney, law firm, corporation, alike. Cost-effective representation is another key consideration. Still, it can certainly enhance an outside attorney’s credibility to resolve a matter quickly and efficiently, notwithstanding that there was little opportunity to “bill time.” Any good result for the client is a good result for the outside counsel. In fact, the in-house counsel may be more willing to advocate for the outside counsel who achieves a favorable result, even though the billings were low, and consider retaining him or her on matters in the future.

Hiring experts is an important decision in almost any litigation. The surest way to foster and build trust with corporate counsel is to involve them in the hiring decisions. Many in-house counsel see the hiring of experts as a collaborative process, working with their outside attorneys to find the most qualified expert, particularly in specialized industries such as pharmaceuticals or the financial services sector. While most corporate counsel would likely defer to their outside attorneys’ recommendations, it is still imperative that corporate legal counsel have a “seat at the table” to offer their own input and insights into the hiring of experts. For larger corporate legal departments, it may be necessary for the experts used in litigation to be vetted and approved by others in executive management for the organization, so it may be necessary for in-house counsel to be directly involved to move forward with retaining an expert. In some specialized industries, there may be only a few “experts” whom everyone already is familiar with, so the hiring decision may be less difficult. Even so, hiring an expert may offer a good opportunity for outside counsel to foster a sense of trust and partnership with corporate counsel and provide an excellent opportunity to “learn the industry.”

Litigation expenses have increased over time, and many corporate legal departments have found arbitration to be a less costly means to resolve disputes amicably. Still, in some instances, arbitration can be quite costly, particularly in cases in which the issues are complex and discovery requirements may be extensive. In the financial services arena, arbitration may be preferred since it is a very specialized industry, and it is not always certain that judges and potential juries will appreciate its myriad details and nuances. There is also a concern that the judicial system will not provide the time and attention to complex financial cases that they deserve. That being said, arbitration is confidential and generally is a less expensive option than costly litigation. Even for sophisticated financial institutions, arbitration may be a good option, particularly if there are co-defendants who may not be agreeable to moving forward with arbitration and arguably have greater liability for the alleged harm; in that case, litigating in court, rather than pursuing arbitration, may be worthwhile, if only to avoid being the only entity defending a claim.

Overall, the essential ingredient to building a successful and long-lasting partnership with in-house counsel is to add value, which may be less an issue of legal acumen than of an attorney’s “soft skills,” e.g., personality, perseverance, communication, and responsiveness. Many in-house lawyers were once “outside counsel” themselves, and they may have a difficult time giving up control to someone else. In that respect, the last thing that an in-house counsel wants to think is that he or she could have done a better job handling a particular matter. By making an effort to collaborate and

to communicate consistently with in-house counsel, and to define their overall objections and goals clearly, outside counsel can build effective working relationships with corporate counsel, and develop the trust and confidence that will inure to the mutual benefit of both in the present and in the future.



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